No. 02-1521

Supreme Court, U.S.
FILED
JUN 5 - 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
And On Behalf Of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both As Private Attorneys General,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

EDWARD R. BARILLARI
HOWARD SPIERER
AT&T CORP.
900 Route 202/206N
Bedminster, NJ 07921
(908) 532-1750

DAVID W. CARPENTER*
PAUL J. ZIDLICKY
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
(312) 853-7000

MARK E. HADDAD
JENNIFER A. RATNER
SIDLEY AUSTIN BROWN & WOOD LLP
555 W. Fifth Street, 40th Floor
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

June 5, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF

AT&T demonstrated in its petition that the Ninth Circuit's decision below creates a square and acknowledged conflict with the Seventh Circuit's decision in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002), as to whether the lawfulness of rates, terms, and conditions of interstate long distance telephone service is governed by federal or state law. AT&T further demonstrated that the Ninth Circuit's decision to enforce state rather than federal law conflicts both with prior decisions of this Court holding that sections 201 and 202 of the Communications Act preempt state law challenges to contractual provisions governing the liability of communications common carriers even in the absence of any statutory requirement to file tariffs, and with the FCC's policies and *Detariffing Orders* implementing Section 10 of the Act, 47 U.S.C. § 160.

The importance of the question presented is plain. There are numerous companies that each offer interstate telecommunications services to millions of residential customers nationwide. As the *amicus* brief filed by BellSouth, Qwest, and Verizon, and the additional *amicus* brief by MCI/WorldCom and Sprint confirm, it is of vital importance that common carriers know whether the lawfulness of the terms on which they offer their services are governed by federal or state law. The current situation, in which otherwise nationally standard terms of service are subject to different legal standards in California than in the states of the Seventh Circuit, and in which no carrier knows what law governs their contracts in any other state, has created tremendous confusion and uncertainty over the applicable law and is imposing significant and unnecessary litigation costs on carriers and their customers. Outside of California and the Seventh Circuit, for example, no carrier or customer knows today whether lawsuits brought as putative class actions (and many are pending) will be resolved in a class action proceeding in state or federal court, or

alternatively must proceed on an individual basis through arbitration, in small claims court, or in a complaint proceeding before the FCC.

Each of the considerations by which this Court traditionally evaluates a petition for a writ of certiorari thus supports a grant of the petition. Respondents' attempts to distinguish the decisional conflicts and to downplay the legal and practical significance of the question presented are forced and unpersuasive.

A. Respondents Fail To Distinguish *Boomer*

1. Respondents first claim that the split with *Boomer* is insignificant because the two cases evaluated "very different contracts." Opp. 3, 16. This is incorrect for two reasons.

First, the Ninth Circuit's refusal to follow the Seventh Circuit did not turn on any difference in the contractual provisions. Rather, the Ninth Circuit refused to follow the Seventh Circuit's legal analysis of the scope of federal preemption, which it labeled "novel." Pet. App. 10a-11a.

Second, and in any event, the key contract provisions at issue in *Boomer* and in this petition are identical. The heart of each dispute is whether AT&T may enforce its dispute resolution provision foreclosing class actions and requiring customers to bring such claims to individual arbitration, to small claims court, or to the FCC. The Seventh Circuit, applying federal law, found this dispute resolution provision of the Consumer Services Agreement enforceable; the Ninth Circuit, applying state law to the same dispute resolution provision, did not.

In this regard, Respondents' attempt to raise the specter of an adequate and independent "state-law ground" (Opp. 18) for affirming the decision below has no merit. There cannot be such a ground in a case such as this, where the question presented is whether the District Court was permitted to apply state law at all. Under the Seventh Circuit's analysis, state

law simply has no role to play in evaluating the substantive reasonableness of the rates, terms and conditions of interstate telecommunications service.[1]

2. Respondents next claim that the *Ting* and *Boomer* decisions "shared many precepts, and only disagreed about fairly narrow aspects" of the law. Opp. 4, 20. This is untrue, as any fair-minded review of *Boomer* and *Ting* readily shows. *Boomer* sets forth in detail the Seventh Circuit's views that §§ 201 and 202 preempt the application of state law, that these provisions operate in particular to preempt state unconscionability law to the extent it is invoked to invalidate arbitration requirements and class action bans, that the preemptive effect of §§ 201 and 202 is independent from the preemptive scope of § 203 and the filed tariff doctrine, and that the FCC's *Detariffing Orders* confirm that state law does not govern the lawfulness of the rates, terms, and conditions of interstate telecommunications service. See *Boomer*, 309 F.3d at 418-23.

The Ninth Circuit did not distinguish *Boomer* on its facts but instead directly and necessarily rejected each of the *Boomer* court's core holdings. See Pet. 17-19. Indeed, the *Ting* court's rejection of *Boomer* was determinative of the Ninth Circuit's ultimate decision. Pet. App. 10a-11a. Conversely, the ostensibly shared "precepts" on which respondents rely include some points (such as the role of state

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[1] Respondents only confirm their continuing confusion over these matters when they claim that the alleged unlawfulness of two provisions of the CSA under federal law would provide a basis under state law for the Court to affirm the invalidation of the arbitration and class action provisions. As Respondents concede (Opp. 17), they expressly disclaimed below making any challenge to the lawfulness of any provision of the CSA under the Communications Act, and so there are no determinations regarding the lawfulness of these provisions under the FCA in this case. And even if there were, such findings still could not justify a further holding under *state* law that *other* provisions, such as the requirement of individual arbitration and the class action bar, are invalid, for once again that would be an application of state law that is preempted under the FCA.

law in governing contract formation, see Opp. 20-21) that AT&T itself has acknowledged and not challenged since day one. The Ninth Circuit recognized that its decision departed dramatically and significantly from that of the Seventh Circuit (Pet. App. 11a), and respondents err in pretending otherwise.

3. Respondents attempt to argue that this case is a "poor vehicle" to address the question presented (Opp. 4, 20-22), but present no coherent reason why this is so. They chiefly discuss their view of the merits of state law in supplanting the "era of lawlessness" they believe would result from the continuing application of uniform federal requirements of reasonableness and nondiscrimination (*id.* at 12, 20-21), but fail to identify any respect in which these facts do not fairly present, or why the Court could not reach, the question presented. Respondents do note (*id.* at 22) that AT&T has revised the CSA with respect to some of the provisions that respondents originally challenged, but their reliance on this point is both disingenuous and unavailing. The focus of respondents' lawsuit has always been to invalidate the dispute resolution provision barring class actions and requiring individualized arbitration, and that is the provision that was enforced in *Boomer* and that AT&T seeks to validate here.

Respondents do not and cannot argue that the provision of the CSA mandating individualized arbitration and barring class actions is invalid under the FCA. Their only argument is that this provision is invalid under state law. The validity and enforceability of the arbitration/class action provision thus turns entirely on whether federal law governs (as the Seventh Circuit held, in compelling individual arbitration) or state law governs (as the Ninth Circuit held, in invalidating the provision). Indeed, the Seventh Circuit expressly considered and rejected the lengthy District Court decision in *Ting* that the Ninth Circuit later affirmed, and thus was fully aware – contrary to respondents' claims – of the "factual record[]" (*id.* at 19) in *Ting* that could be cited in support of a state-law unconscionability challenge. The conflicting courts

of appeals thus considered largely the same record and arguments. It is difficult to imagine a better vehicle than this case for resolving the stark conflict on the question of federal preemption presented here.

4. Unable to distinguish *Boomer*, respondents argue that it is "premature" for the Court to address the conflict. Opp. 22. In their view, the Seventh Circuit erred in "rushing to resolve the issue." *Id.* at 22-23. They therefore urge this Court to allow the law to "develop and percolate." *Id.* at 4.

Although respondents criticize the Seventh Circuit for having decided *Boomer* quickly, the opinion is thoughtful and well-reasoned, and respondents cannot and do not argue otherwise. Their only substantive criticism (*id.* at 22) is that the Seventh Circuit did not "cite to or mention" the FCC's decision in *Orloff* v. *Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987 (2002).

Consideration of *Orloff*, however, would not have altered the Seventh Circuit's decision. The FCC broke no new ground in *Orloff* regarding the requirements of §§ 201 and 202, but instead applied long-standing principles that pre-date the FCC's detariffing decisions. *Id.* at 8994 (¶ 14) & nn.43-44 (citing precedent setting forth governing legal standards). In upholding the individually negotiated rates in *Orloff*, the Commission found that the rates afforded no unlawful preferences and reaffirmed that it would not "hesitate to find that unreasonable discrimination violates section 202." *Id.* at 8998 (¶ 22). Not only did the FCC not purport to alter the prohibition against state-law based geographic preferences, it "emphasize[d]" that *Orloff* was "confined to the facts of th[at] case," *Id.* at 8999 (¶ 24) n.79, and cautioned that "what is reasonable in this market does not necessarily translate to other markets" (*id.* at 8998 (¶ 22)), leaving no doubt that *Orloff* was simply a fact-specific application of longstanding FCC standards concerning negotiated rates.

In any event, speculation about what another Court might say is beside the point, because resolution of this question is urgently needed. Within months of the District Court's decision in *Ting*, more than 50 class action lawsuits were filed against AT&T, MCI, and Sprint alleging that they overcollect from customers for amounts contributed to the federal Universal Service Fund ("USF"). Most of these USF cases have been consolidated by the Judicial Panel on Multi-District Litigation, and are pending in the United States District Court for the District of Kansas. The motions of AT&T and Sprint to compel arbitration of these actions are fully briefed, but not decided. In an opinion filed May 27, 2003, the MDL court stated that it "will retain the motions under advisement at least until the United States Supreme Court decides whether it will grant AT&T's petition for writ of certiorari in *AT&T Corp. v. Ting*, No. 02-1521."[2] Several other actions are currently pending against AT&T, including two state court class actions in Illinois (one of which followed *Boomer* and another which did not),[3] one in Massachusetts (which followed *Boomer*),[4] and four USF cases that are pending in various state courts and have been stayed pending a decision by the MDL court.[5]

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[2] *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468, slip op. at 1 (D. Kan. May 27, 2003) (Memorandum and Order), *available at* http://www.ksd.uscourts.gov.

[3] *See Ragan* v. *AT&T Corp.*, No. 02 L 168 (Cir. Ct. Madison Cty. Ill.) (refusing to follow *Boomer*), *appeal pending*, No. 5-03-0038 (5th Dist. App. Ct docketed Jan. 17, 2002); *Ramette* v. *AT&T Corp.*, No. 01 CH 17702 (Cir. Ct. Cook Cty. Ill. Nov. 21, 2002) (granting motion to compel), *appeal pending*, No. 1-03-0031 (1st Dist. App. Ct. docketed Jan. 3, 2003).

[4] *See Kisala* v. *AT&T Corp.*, 02-CV-10752-MEL, slip op. at 8-9 (D. Mass. Jan. 15, 2003) (Memorandum and Order) (following *Boomer*).

[5] *See Gordon* v. *AT&T Corp.*, No. 02601262 (Sup. Ct. N.Y. Cty. N.Y. filed Apr. 2, 2002); *Myhre* v. *AT&T Corp.*, No. GIC 791275 (Super. Ct. San Diego Cty. Cal. filed June 25, 2002); *Thomas* v. *AT&T Corp.*, No. BC 271088 (Super. Ct. L.A. Cty. Cal. filed Apr. 2, 2002); *Hood* v. *AT&T Corp.*, No. CV 02-1677 (Cir. Ct. Jefferson Cty. Ala. filed Nov. 27, 2002).

The threshold issue in all of these cases is the enforceability of the arbitration provision in the CSA. As the MDL proceedings and *amicus* briefs make clear, the issue is one that affects all interstate communications carriers. Little good would be served by waiting for more courts to choose up sides between *Ting* and *Boomer*. The cost to litigants in extended appeals, uncertainty, and avoidable litigation costs is damaging and wasteful. And as the *amici* explain at length, the uncertainty is particularly great here, because it is not limited to the issue of whether federal or state law governs. Rather, in the event a particular court holds that state law governs, there is no basis to predict how that court will apply state law, because the substantive lawfulness of the terms of interstate telecommunications service has been governed, since its inception, by federal law.[6]

The legal issues relevant to the Court's resolution of the preemption issue are well-developed in the two conflicting circuit court decisions. The volume of lower court litigation makes it inevitable that this Court will need to resolve that conflict. In these circumstances, there is no benefit, but only great cost, to delaying resolution of this issue.

Finally, even apart from the pending litigation, the remedy ordered in this case alone merits this Court's plenary review. This is not a simple damages case. Absent this Court's review, AT&T will remain subject to a permanent injunction in California that bars AT&T from enforcing terms that another circuit court of appeals has held to be immune from challenge under state law and fully enforceable, and that are concededly lawful under federal law. This injunction, which

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[6] No carrier could have predicted, for example, that mailing a cover letter and a short, standard-form contract to customers in an envelope marked "**Attention**: Important information concerning your AT&T service enclosed" would be "procedurally unconscionable" under state law, particularly since the FCC had expressly stated its expectation that customers would be notified of their terms of service in this fashion. *Compare* Pet. 8-9, *and* Pet. App. 107a-109a, *with* Pet. App. 89a.

currently governs AT&T's contractual relationships with 7 million long distance customers in California, is itself of unusual scope and national importance. Given the conflicting holdings of the courts of appeals, this injunction should not be permitted to stand without further review by this Court.

B. Respondents' Other Arguments Lack Merit

The square and significant conflict with *Boomer* is more than ample grounds to justify granting the petition. Nevertheless, AT&T has also shown that the Ninth Circuit's decision conflicts with decisions of this Court and with the FCC's *Detariffing Orders*. These conflicts also warrant this Court's review. Respondents disagree only by ignoring or misconceiving this Court's decisions and the FCC's orders.

1. Respondents cannot deny that this Court has repeatedly held that § 202(a) preempts state-law claims that "'constitute unlawful preferences'" even absent any tariff-filing requirement. See Pet. 20-22 (discussing, *inter alia*, *Postal Tel.-Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919) and *Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921) (Brandeis, J.)). They argue only that the factual context for *Esteve* was one of monopoly rather than of competition in long distance service, and assert that *Esteve* is no longer good law in light of "the 1996 Amendments" to the Communications Act "and the FCC's decision to detariff." Opp. 28.

Respondents' attempt to support their thesis is conspicuously thin. They ignore that Congress, in 1934, borrowed the operative preemption language of the Communications Act from the Interstate Commerce Act in order to preserve the value of prior court and commission interpretations of that language. See Pet. 4. They similarly ignore the language of Section 10 of the FCA, which permits the FCC to forbear from enforcing provisions of the Act only where the FCC makes certain findings that the FCC has never attempted to make with respect to §§ 201 and 202. See Pet.

6-7, 25. And they mistakenly construe provisions of the FCA that pertain to intrastate service as applicable to interstate service. Compare Pet. 6, and *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999), with Opp. 21, 27.

For these and other reasons, the likelihood that respondents could demonstrate that Congress or the FCC has effectively swept aside this Court's prior constructions of the preemptive scope of §§ 201 and 202 is remote. But even taken at face value, respondents' notion that Congress, *sub silentio*, has now rendered prior holdings of this Court a nullity is itself a reason to grant this petition. Indeed, this Court reaffirmed the vitality of these prior holdings in *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998) ("*COT*"). Respondents not only fail to address the pertinent holding of *COT* (compare Pet. 22, with Opp. 28-29), but revive an argument about the FCA's "Savings Clause" (see Opp. 23-24 & n.8) that this Court has repeatedly rejected.[7] In these ways, the Opposition underscores petitioner's showings that the Ninth Circuit decided the case erroneously and that the conflict with this Court's decisions merits review.

2. Respondents also fail to mount any convincing defense of the Ninth Circuit's interpretation of the FCC's *Detariffing Orders*. Like the Ninth Circuit, respondents can point only to snippets in the FCC's orders that they claim support their view. And like the Ninth Circuit, they cannot offer any interpretation of the FCC's decision to grant AT&T's petition for clarification that both supports their argument and can be reconciled with the context in which AT&T's petition arose and with the FCC's resolution of it.

According to respondents, the Commission "agreed" with AT&T's request for clarification "only to the extent that it acknowledged that it was not wholly abandoning its authority under § 201 and § 202." Opp. 25. But AT&T never sought

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[7] *See COT*, 524 U.S. at 227-28; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

clarification that the FCC would continue to consider challenges to the legality of rates, terms and conditions of interstate services under §§ 201 and 202. The *Detariffing Order* left no doubt that the Commission would continue to remedy violations of §§ 201 and 202 through its authority "to investigate and adjudicate complaints under Section 208." *Interstate Interexchange Marketplace*, 11 FCC Rcd. 20,730, 20,743 (¶ 21) (1996); see also *id.* at 20,750 (¶ 36) (FCC's continued "administration of the Section 208 Complaint process" would address violations of "Sections 201 and 202").

Contrary to respondents' argument (Opp. 24-26), the FCC expressly understood that AT&T sought clarification that "federal, and not state, law governs the determination as to whether a [carrier's] rates, terms and conditions . . . are lawful." *Interstate Interexchange Marketplace*, 12 FCC Rcd. 15,014, 15,056 (¶ 76) (1997). After "agree[ing]" with AT&T that "the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions," the Commission explained further that "the Communications Act does not govern other issues, such as contract formation and breach of contract" for which "consumers may have remedies under state consumer protection and contract laws." *Id.* at 15,057 (¶ 77). These conclusions cannot be reconciled with respondents' position that the lawfulness of rates, terms and conditions of interexchange service – matters which lie at the heart of the Communications Act – are nevertheless now governed not by federal law, but by state law.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD R. BARILLARI
HOWARD SPIERER
AT&T CORP.
900 Route 202/206N
Bedminster, NJ 07921
(908) 532-1750

DAVID W. CARPENTER*
PAUL J. ZIDLICKY
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603
(312) 853-7000

MARK E. HADDAD
JENNIFER A. RATNER
SIDLEY AUSTIN BROWN & WOOD LLP
555 W. Fifth Street, 40th Floor
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

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